

**HEATHER HORTON**  
Claimant

# WENDY'S

Respondent

**KS RESTAURANT & HOSPITALITY ASSN.**

Insurance Carrier

Claimant sustained a compensable injury to her knee and was provided orthopaedic treatment. Unfortunately, it took some time for the physicians to accurately diagnose and

treat her ongoing complaints. Claimant's knee was surgically treated and since that time, she has by all accounts recovered well from that procedure. However, claimant still clings to her belief that she was mistreated by her supervisor (one in particular) as a result of her injury and generally feels as though her subjective complaints of pain while at work were not taken seriously. She also testified that she has angry thoughts against her employer (most specifically the now-former supervisor) and is depressed.

At one of her last visits with the orthopaedic physician she expressed these concerns and asked for a referral to someone to help her with her perceived depression and overall emotional complaints. While the treating physician, Dr. Peter Lepse, provided her with that referral respondent refused to comply. Claimant was also seen by Dr. Schulman, at the request of her attorney, and according to Dr. Schulman claimant is in need of psychiatric treatment to help her deal with her emotions following her injury and resulting treatment.

After considering claimant's testimony as well as the depositions of Dr. Lepse and Dr. Schulman, the ALJ granted claimant's request. In doing so he must have been persuaded that claimant's present need for psychiatric treatment was causally connected to her work-related injury.

Respondent has appealed this Order and contends that claimant's need for psychiatric treatment is not caused by her injury. Rather, it is caused by her perception that her employer was less than understanding and nurturing about her injury and the circumstances that followed. In support of her contention, claimant offered Dr. Schulman's testimony. He opined that claimant's need for treatment stemmed from her accident and had she not had her accident, he would have had no cause to see her.<sup>1</sup> He went on to testify that claimant, an individual who had lived a rather sheltered life, expected understanding and nurturing from her employer following her injury. Instead, she perceived a cavalier and careless attitude which gave rise to anger and depression. As her treatment wound down she expressed these feelings to Dr. Lepse and he made the appropriate referral.

Respondent concedes that claimant has testified about her depression following the accident and that the treating physician has made a referral consistent with her request for such treatment. Nonetheless, respondent maintains that -

If all that is required at the conclusion of treatment of the physical injury is for the [c]laimant to request a referral for psychological care, then there is no element of causation required. Causation is not shown by the [c]laimant asking for a referral. Causation has to be determined from the discernable [sic] facts. Here [c]laimant had an injury. She had treatment. She concluded that treatment with a good

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<sup>1</sup> Schulman Depo. at 30, 41.

recovery. She then asked for psychological care and was granted it not because the physician making the referral believed she needed psychological care, but because she had made the request. The required proof of causation is absent under these facts.<sup>2</sup>

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.<sup>3</sup> A claimant must establish that his personal injury was caused by an “accident arising out of and in the course of employment.”<sup>4</sup> The phrase “arising out of” employment requires some causal connection between the injury and the employment.<sup>5</sup> The existence, nature and extent of the disability of an injured workman is a question of fact.<sup>6</sup> A workers compensation claimant’s testimony alone is sufficient evidence of the claimant’s physical condition.<sup>7</sup>

Psychological treatment is available to a workers compensation claimant when he/she 1) sustains a work related physical injury; followed by 2) symptoms of traumatic neurosis; when 3) the neurosis is directly traceable to the physical injury; and 4) a casual connection between the work performed and the neurosis.<sup>8</sup>

Respondent makes much of the fact that claimant did not express her need for psychiatric treatment until she was on the verge of being released from treatment. Moreover, respondent maintains that “all the stimulus affecting [c]laimant, i.e. her former boss at the North Topeka store, and any issues regarding her medical treatment were no longer present.”<sup>9</sup>

While the work atmosphere and location may have changed by early 2008, after claimant had knee surgery, there is no dispute that claimant’s perceptions of her direct supervisor’s callousness towards her and her injury existed after her injury and during the

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<sup>2</sup> Respondent’s Brief 4-5 (filed May 8, 2008).

<sup>3</sup> K.S.A. 44-501(a) (Furse 2000); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

<sup>4</sup> K.S.A. 44-501(a).

<sup>5</sup> *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

<sup>6</sup> *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

<sup>7</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

<sup>8</sup> *Love v. McDonald’s Restaurant*, 13 Kan. App.2d 397, 77 P.2d 577, *rev. denied* 245 Kan. 784 (1989).

<sup>9</sup> Respondent’s Brief at 3 (filed May 8, 2008).

course of her recovery. And while it is clear from the record, including her own testimony, that claimant has lived a somewhat sheltered life and may expect more out of any given employer than is realistic, the uncontroverted evidence establishes that claimant was injured, had a troubled diagnostic experience and perceptions of a lack of understanding within the workplace. She was able to transfer to a different situation but she still suffers from lingering thoughts of anger and depression. Based upon the medical evidence within the file, all of these thoughts are attributable to her injury. There is no evidence that she was depressed before her injury. And while the focus of her feelings is certainly on her employer, they all began with her injury, her perception of the employer's reaction to that injury and the delay in treatment.

The only explanation within the record for her need for treatment is her work-related accident and events that followed. This Board Member finds that the ALJ's Order should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>10</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated April 11, 2008, is affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2008.

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JULIE A.N. SAMPLE  
BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant  
Larry G. Karns, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge

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<sup>10</sup> K.S.A. 44-534a.